Supreme Court, U.S.
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No. 09-

IN THE

Supreme Court of the United States

AIMEE ZMYSLY, AS REPRESENTATIVE AND GUARDIAN OF THE PERSON AND ESTATE OF YURIY ZMYSLY, A DISABLED ADULT,

Petitioner,

v.

UNITED STATES OF AMERICA, CHERRY POINT NAVAL HOSPITAL, DAVID KAPLAN, M.D., JAMES CHRISTOPHER, M.D., AND CHRISTOPHER OUDEKERK, CRNA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the *Feres* rule, as applied to claims for injuries to active-duty military personnel due to medical negligence and not arising out of combat activities or within an arena of combat, violates the equal protection guarantee of the Fifth Amendment and the fundamental right of access to the courts and should be overruled or limited in its application?

2. Whether treatment of *Feres* objections as a question of subject-matter jurisdiction and subject to immediate dismissal, denies a fundamental right of access to justice so as to prevent judicial evaluation of the context of the claim and thus the degree of deference due military decision-making in the matter, and improperly results in some non-employee defendants hiding behind the military's immunity and never revealing their employment status and eligibility for dismissal on *Feres* grounds?

PARTIES TO THE PROCEEDINGS

Petitioner is Aimee Zmysly, as representative and guardian of the person and estate of Yuriy Zmysly, a disabled adult. Respondent is the United States of America. Respondents are the United States of America, Cherry Point Naval Hospital, Doctors David Kaplan and James Christopher, and Nurse Christopher Oudekerk.

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PETITION FOR A WRIT OF CERTIORARI

Aimee Zmysly respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Seventh Circuit (App. 21a) summarily affirmed the District Court's dismissal of this action on December 7, 2009 and treated a reply to a second summary affirmance motion as a motion for reconsideration (App. 25a), which it denied in an order dated December 14, 2009, both without published opinion. The statement of the United States District Court for the Northern District of Illinois (App. 1a, 3a), accompanying the court's order granting defendants' motion to dismiss is unreported.

JURISDICTION

The judgment of the Seventh Circuit was issued on December 7, 2009. The Seventh Circuit denied reconsideration of its order on December 14, 2009. (App. 25a). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portion of the First Amendment guarantees that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances.

The Fifth Amendment guarantees that "No person [shall] be deprived of life, liberty, or property, without due process of law. . . ."

The relevant provisions of the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80, are reproduced at App. 27a.

INTRODUCTION

Yuriy Zmysly proudly served tours of duty of ten months in Afghanistan and seven months in Iran as a United States Marine. He returned to the United States a healthy 20-year-old. On January 9, 2006, while still in the Marine Corps and stationed in North Carolina, Yuriy experienced severe abdominal pain and sought medical attention at the emergency room of Cherry Point Naval Hospital. He was diagnosed with a perforated appendix and received an appendectomy. The botched surgery that took place left him severely disabled after he was totally deprived of oxygen.

Yuriy now lives as a severely disabled adult in Chicago. He has received some medical benefits, but those benefits have not covered the full extent of his medical and living needs. Because of his disabling injuries, Yuriy is unable to pay for necessary medical care and treatment.

Under this Court's decision in *Feres v. United States*, 340 U.S. 135 (1950), the lower courts believe no redress is available to Yuriy or those situated like him, despite the longstanding existence of the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1291 *et seq.*, which waives sovereign immunity and authorizes certain tort actions against the United

States "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. In *Feres*, this Court created a non-textual exemption to the FTCA, holding that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146.

Like other courts, the District Court relied upon that statement to dismiss this action for lack of subject-matter jurisdiction without examining the circumstances of the injury, countervailing military concerns, or the identity of the named defendants. The mechanical application of *Feres* immunity in this manner threatens to undermine what this Court has called "[o]ne of the first duties of government" and the "very essence of civil liberty": to secure "the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

The United States implicitly recognized the propriety of this Court's review of the reach, application, and continuity validity of *Feres*, when it asked the Seventh Circuit to affirm summarily the District Court's dismissal of this action: "What plaintiff needs from this court is her ticket punched so she can raise her serious issues before the Supreme Court, the only court that can overturn sixty years of its own clear precedent." (App. 18a).

Feres has engendered repeated pleas for reconsideration by members of this Court, the lower courts, and the military justice system because of its arbitrary, confusing, and shifting applications. The time is right for this Court to reexamine *Feres*. The

nature of the military has changed dramatically since the decision was rendered, as has this Court's application of the equal-protection guarantee and its treatment of the right of access to the courts, both of which the doctrine implicates. *Feres* should not be immune from reexamination in light of today's military and today's constitutional doctrine.

STATEMENT OF THE CASE

A. Factual Background

At the time of the alleged medical negligence, Yuriy Zmysly was a United States Marine on active duty, stationed at the Marine Corps Air Station Cherry Point in North Carolina. He had served a tour of duty in Afghanistan and a tour of duty in Iraq, and had returned safely. He was 20 years old.

On January 9, 2006, Private Zmysly went to the emergency room at the Cherry Point Naval Hospital complaining of severe abdominal pain. The following day, he was diagnosed with a perforated appendix and scheduled for an immediate laparoscopic appendectomy. After the operation, Zmysly was extubated in the operating room, but quickly became hypoxic and showed signs of respiratory distress. An attempt to reintubate him was unsuccessful. A code was called, and an emergency cricothyroidotomy was performed to establish a surgical airway. By the time Yuriy was resuscitated and able to breathe again, he had suffered catastrophic anoxic brain injury due to lack of oxygen. As a consequence, he is permanently and severely disabled.

B. Proceedings Below

On January 8, 2008, Yuriy filed an administrative medical negligence claim under the Federal Torts Claim Act, 28 U.S.C. § 2671 *et seq.* ("FTCA") with the United States government, which denied the claim. On October 24, 2008, Aimee Zmysly, as representative and guardian of her husband, Yuriy Zmysly, filed this action pursuant to the FTCA, alleging medical negligence on the part of the United States through its agents or employees and naming each of the medical personnel individually.

The government moved to substitute the United States as defendant for Dr. James Christopher and nurse anesthetist Chris Oudekerk, who it said were acting within the scope of their employment, and moved to dismiss the action. Co-defendant Dr. David Kaplan retained private counsel. On January 30, 2009, defendant Kaplan moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) based on a claim that the certificate of merit attached to the complaint as required by Illinois law, was inadequate. On March 5, 2009, the United States filed a motion to dismiss Plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(1) based on the *Feres* Doctrine. The District Court dismissed the case as to all defendants for lack of subject matter jurisdiction, relying solely on *Feres*, on August 20, 2009. App. 1a, 3a.

Plaintiff appealed. On November 18, 2009, the United States filed a motion for summary affirmance, stating that "[w]hat the plaintiff needs from this court is her ticket punched and so she could raise her serious issues before the Supreme Court, the only court that can overturn sixty years of its own clear precedent." App. 18a. On December 3,

2009, defendant Kaplan filed a motion for summary affirmance, adopting the arguments of the United States and asserting waiver of any non-*Feres* arguments against Kaplan, though still never identifying Kaplan's employment status for *Feres* purposes.

On December 7, 2009, the Seventh Circuit granted summary affirmance for the United States, stating that "it doesn't matter whether the initial need for medical care arose because, for example, an active duty service member was shot by enemy fire or was injured playing basketball or having his appendix removed." App. 23a. In response to Zmysly's opposition to Kaplan's summary affirmance motion and alternative request to reset the briefing schedule filed on December 10, 2009, the Seventh Circuit, on December 14, 2009, treated the filing as a request for rehearing, which it denied, stating "Appellant has forfeited any argument that Kaplan is legally distinct from the other four defendants." App. 26a.

REASONS FOR GRANTING THE PETITION

This case presents issues of great national importance relating to the constitutional rights of the men and women who serve this country in the military. While military order and discipline have a heightened call upon their conduct and result in a rescission of some of their rights in particular circumstances, those considerations evaporate where vindication of those rights poses no burden on military command and obedience. In situations like the one presented here, the diminution of their rights through unequal treatment and undue limitations of

their rights to redress cannot be reconciled with the same rights they risk their lives to protect.

The conflict between the Seventh Circuit's categorical subject-matter jurisdiction approach to *Feres* and the balancing tests employed in other circuits and in all other disputes between the military and its personnel is stark and in need of this Court's attention. The implementation of *Feres* immunity by the lower courts here and in other similar instances admits no consideration of context and heightens the discrimination improperly visited upon members of our military service, while often producing indefensible and occasionally absurd results.

The flat ban on the hearing of service members' medical-malpractice claims employed by the Seventh Circuit contrasts sharply with the well-established truism that not all disputes between the military and its personnel are beyond redress in the civilian courts. In a nation that boasts that there are no second-class citizens, the more than 1.4 million people who serve in the active Army, Navy, Marine Corps, and Air Force, and more than one million others who serve in their reserve components,[1] have been relegated to a secondary status when it comes

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[1] Bureau of Labor Statistics, Occupational Outlook Handbook, 2010-11, http://www.bls.gov/oco/ocos249.htm (last visited Mar. 2, 2010). In fact, the Department of Defense declares with great pride, "we are the nation's largest employer." U.S. Dep't of Defense, DOD101: An Introductory Overview of the Department of Defense, http://www.defense.gov/pubs/ dod101/index.html (last visited Mar. 2, 2010).

to redress for medical error.[2] Because the "military health care system is one of the largest health care systems in the nation,"[3] and a certain amount of medical error resulting from negligence will undoubtedly occur, the problem posed by this Petition is a recurring one of great practical significance.

This Court should not wait upon Congress to remedy the unequal treatment visited upon military members and their families by *Feres*. Congressional inaction is not a reliable indicator that lawmakers approve the Court's construction of an unexpressed exception within the FTCA and should not dissuade this Court from reconsidering its own precedent, when, as here, it implicates constitutional rights. This Court alone is ultimately responsible for guaranteeing equal protection of the law to all Americans.

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[2] *See* Edwin F. Hornbrook & Eugene J. Kirschbaum, *The Feres Doctrine: Here Today—Gone Tomorrow?* 33 Air Force L. Rev. 1, 11 (1990) ("Because they cannot bring suit, although even federal prisoners can, military personnel are sometimes referred to as second-class citizens."). At least one federal appellate judge agrees, declaring that *Feres* immunity "effectively declares that the members of the United States military are not equal citizens, as their rights against their government are less than the rights of their fellow Americans." *Costo v. United States*, 248 F.3d 863, 870 (9th Cir. 2001) (Ferguson, J., dissenting). *See also Persons v. United States*, 925 F.2d 292, 299 (9th Cir. 1991) (terming this irrational discrimination a "glaring anomaly").

[3] Congressional Budget Office, Restructuring Military Medical Care (July 1995), *available at* http://www.cbo.gov/doc.cfm?index=5309&type=0.

I. *FERES* IS RIPE FOR RECONSIDERATION, IN LIGHT OF ITS IMPLICATIONS FOR THE CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL AND THE CONTINUING PROTESTS OF LOWER COURTS OVER ITS APPLICATION

> This Court has applied the *Feres* doctrine multiple times, though it has never addressed its impact on service members' constitutional rights. Since the original decision in *Feres*, the relevant constitutional rights implicated, equal protection and access to the courts, have undergone doctrinal advances and has had application to military personnel unforeseen by the *Feres* Court. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677 (1973).

Neither the lengthy tenure of *Feres* nor the various rationales put forth in its favor should give this Court pause in finding reason to review its present validity as applied to instances of medical malpractice occurring outside the arena of war.

As this Court recently stated, "[r]evisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule . . . , and experience has pointed up the precedent's shortcomings." *Pearson* v. *Callahan*, --- U.S. ----, 129 S. Ct. 808, 816 (2009) (overruling *Saucier* v. *Katz*, 533 U.S. 194 (2001)). Each of these considerations supports review here. First, the denial of subject-matter jurisdiction over medical-malpractice claims

by active-duty service members, as opposed to the acceptance of jurisdiction over identical claims by the same service members' families,[4] does not affect the way that military hospitals order their affairs. Moreover, abrogation of *Feres* in this context imposes no unusual liability. Medical malpractice is a well-recognized and centuries-old cause of action, well within the competence of a civilian court and cognizable under local law as if the "defendant were a private party;" it does not impose "'novel and unprecedented liabilities,'" as the *Feres* Court feared. *United States v. Brown*, 348 U.S. 110, 113 (1954), quoting *Feres*, 340 U.S. at 142.[5] In fact, the *Feres* Court itself noted, the "Tort Claims Act was not an isolated and spontaneous flash of congressional generosity." *Feres*, 340 U.S. at 139. Instead, it "marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit." *Id.*

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[4] A RAND study established that 8.5 million beneficiaries in the United States utilize the military health services system. Susan D. Hosek, *et al.*, RAND, *The Demand for Military Health Care* 3 (1995). These numbers include family members of service personnel, veterans and non-active duty beneficiaries, *see* 10 U.S.C. §§ 1071-1106, none of whose medical-malpractice claims are subject to dismissal under *Feres*. *See United States v. Brown*, 348 U.S. 110 (1954) (veterans); *Brown v. United States*, 462 F.3d 609 (6th Cir. 2006) (minor dependant injured prenatally when mother was an active-duty service member).

[5] The *Brown* Court ruled that the service member's receipt of government benefits for his injury should reduce, but not bar, his claim under the FTCA. *Id.* at 111 n*.

Second, the *Feres* doctrine was a judge-made exception to the FTCA, Jonathan Turley, *Pax Militaris: The* Feres *Doctrine and the Retention of Sovereign Immunity in the Military System of Governance,* 71 GEO. WASH. L. REV. 1, 3 (2003), with no textual basis. *United States v. Johnson*, 481 U.S. 681, 693-703 (1987) (Scalia, J., dissenting). The exception was not the result of congressional choice, but engrafted upon the statute by judicial decision. Criticism of the rule and its various rationales has found broad expression, both by members of this Court and by lower court judges. Thus, Justice Scalia, writing for the four dissenting Justices in *Johnson,* termed the rule's various rationales "absurd," "unpersuasive," and lacking support in the statutory text. 481 U.S. at 695-96 (Scalia, J., dissenting). These dissenters added, "*Feres* was wrongly decided and heartily deserved the 'widespread, almost universal criticism' it has received." *Id.* at 700 (Scalia, J., dissenting) (citation omitted). Typical of lower court decisions critical of the rule is the statement made by the Third Circuit in *Richards v. United States*, 176 F.3d 652, 657 (3d Cir. 1999), where the court stated:

> we are left with a counter-intuitive and inequitable result simply because of Private Richards's military status. It is because *Feres* too often produces such curious results that members of this court repeatedly have expressed misgivings about it.

In the Seventh Circuit, where the present case was decided, the court has reluctantly followed *Feres* while noting that there is but a "tenuous link between these rationales [described in *this Court*'s

decisions] and malpractice cases." *Selbe v. United States*, 130 F.3d 1265, 1268 (7th Cir. 1997). Nonetheless feeling constrained by this Court's decisions, the court below reasoned that dismissal was mandated because "it doesn't matter whether the initial need for medical care arose because, for example, an active duty service member was shot by enemy fire or was injured playing basketball or having his appendix removed." App. 23a.

The doctrine's manifest unfairness and questionable origins has led an increasing number of federal appellate judges to call for this Court's reconsideration. *See, e.g., Matreale v. New Jersey Dep't of Military & Veterans Affairs*, 487 F.3d 150, 159 (3d Cir. 2007) (Smith, J., concurring) ("The doctrine of intra-military immunity remains ripe for reconsideration by the Supreme Court in light of the questionable foundation upon which it stands."); *Costo v. United States*, 248 F.3d 863, 869 (9th Cir. 2001) (Ferguson, J., dissenting); *O'Neill v. United States*, 140 F.3d 564, 566 (3d Cir.1998) (Becker, C.J., statement sur denial of petition for rehearing) ("I urge the Supreme Court to grant certiorari and reconsider *Feres*."). Judge Calabresi, writing for the Second Circuit has suggested that this Court "abandon the doctrine altogether." *Taber v. Maine*, 67 F.3d 1029, 1038 (2d Cir. 1995).

These calls for reexamination have been echoed by jurists and others within the military justice system. In 2001, the National Institute of Military Justice established a Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice, chaired by Senior Judge Walter Cox of the Court of Appeals for the Armed Forces. Although focused primarily on the operation of the military justice

system, the Cox Commission found that *Feres* was so detrimental and unfair as to raise concerns about its adverse impact on military discipline:

> [M]any former service members have been frustrated by its constraints on their ability to pursue apparently legitimate claims against the armed forces, many of which bear little if any relation to the performance of military duties or obedience to orders on their merits, . . . Revisiting the *Feres* Doctrine would also signal to service members that the United States government is committed to promoting fairness and justice in resolving military personnel matters.

Honorable Walter T. Cox, III *et al.*, *Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice* § IV.C. (May 2001).

Other members of the military justice community have pointed out the fact that *Feres* "works such a severe injustice on military personnel and their families. . . . is patently obvious and very well known." Kevin J. Barry, *A Face Lift (and Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, 2002 L. Rev. Mich. St. U. Det. C.L. 57, 120-21. More recently, an Army Judge Advocate published an incisive and critical analysis, concluding that the immunity is too broad and operates against its purported objective of preserving military discipline. Major Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 Mil. L. Rev. 1, 4-5 (2007).

Reconsideration of *Feres* is not just warranted but overdue.

II. THIS COURT'S GUIDANCE IS NEEDED TO DETERMINE WHEN AND UNDER WHAT CIRCUMSTANCES THE CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL SHOULD BE RECOGNIZED

A. Whether the Unequal Treatment of Military Personnel under *Feres* Violates their Right to Equal Protection Is an Important Question of Federal Law that Has Not Been, But Should Be, Settled by this Court

This Court has applied *Feres* multiple times, though it has not addressed its impact on service members' constitutional rights. In fact, the last time this Court applied the rule, in *United States v. Johnson*, 481 U.S. 681 (1987), the Court noted it was not asked to overrule *Feres*, *id.* at 689 n.9, and the 5-4 majority "decline[d] to modify the doctrine at this late date." *Id.* at 688.

Reexamining *Feres* through a constitutional prism is long overdue. It is axiomatic, as Chief Justice Earl Warren once wrote, that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962) (relying on *Burns v. Wilson*, 346 U.S. 137 (1953)). After all, classifications are subject to judicial scrutiny to determine whether they are "'reasonable in light of its purpose.'"

Carrington v. Rash, 380 U.S. 89, 92 (1965) (quotation omitted).

While some rights of service personnel must recede at times because of the exigencies of military command and discipline, *Chappell v. Wallace*, 462 U.S. 296, 304 (1983), a categorical rule abrogating the vindication of those rights, regardless of the circumstances, as the Seventh Circuit said *Feres* demands, constitutes invidious discrimination against military personnel.[6]

Equal protection requires that "all persons similarly situated . . . be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Not only is the right to sue under the FTCA available to civilians, including civilian employees and contractors engaged in the same activities performed by military personnel, but other service members and their families are entitled to sue for money damages in situations that defy reasonable distinction from Private Zmysly's case.

For example, this Court has held that *Feres* does not bar a veteran's claim of negligent treatment at a VA hospital after his discharge from the army, even when the medical treatment was for an injury incurred during active duty. *United States v. Brown*,

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[6] Justice Black, writing for the *Brown* dissenters, recognized this unfairness: "To permit a veteran to recover damages from the Government in circumstances under which a soldier on active duty cannot recover seems like an unjustifiable discrimination which the Act does not require." 348 U.S. at 114 (Black, J., dissenting).

348 U.S. 110, 112 (1954).[7] One way of looking at that is to consider Zmysly's injury as less "incident to service" than Brown's. Unlike Brown's injury, Zmysly's appendicitis was not caused by any military activity. Still, if Zmysly had undergone his appendectomy the day after his discharge, the doors of the district court would have been open to him, even if his cause of action were identical in every other respect to the action dismissed by the District Court below.

It is also true that if Zmysly's civilian wife, who was eligible for the same military health services by virtue of his active-duty status, had entered Cherry Point Naval Hospital with the same complaint and had been tragically injured on the operating table as he had, *Feres* would have posed no bar to his bringing an action on her behalf as well as one for his own loss of consortium. Such an action would call into question the skill and judgment of the very same medical personnel involved in the action dismissed below. *See In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 201, 203 (2d Cir. 1987) (noting the "anomalous" result "that a serviceman-husband performing his military duty would be denied recovery against the Government whose employee's negligence may have caused him serious injury, while his spouse is

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[7] There is no logical distinction here between the military veteran and the active-duty soldier. Both are eligible for military health care, and "a retired soldier, continues in the military service of the Government, is subject to military discipline and has claim for medical and dental care in military institutions." *Watt v. United States*, 246 F.Supp. 386, 388 (E.D.N.Y. 1965) (noting also the difference is active duty personnel are "entitled" to such care, while retired soldiers may receive it subject to availability).

allowed recovery as a consequence of the same set of facts.").

Similarly, *Feres* would not bar an action by Zmysly for injury to his child during an appendectomy at Cherry Point Naval Hospital, even though the child was entitled to care at the facility solely as a dependent of an active-duty service member. In such a situation, Zmysly would be entitled to seek money damages for his own loss due to the negligent treatment of his child. *See, e.g., Bravo v. United States*, 532 F.3d 1154 (11th Cir. 2008) (active-duty naval service member recovered loss of consortium damages as a result of negligent injury to dependent son at Navy hospital); *Lebron v. United States*, 279 F.3d 321 (5th Cir. 2002) (active-duty service member recovered economic damages and loss of consortium as a result of medical malpractice injury to child at Army hospital).

B. Evaluation of Claims by Military Personnel in Other Circuits as Well as Outside the *Feres* Context Proceeds Differently But No Rational Distinction Justifies Treating FTCA Claims Differently

This Court has sent lower courts mixed signals on the application of *Feres*. In *United States v. Shearer*, 473 U.S. 52 (1985), for example, this Court admonished lower courts that application of the *Feres* Doctrine "cannot be reduced to a few bright-line rules," emphasizing instead a fact-intensive inquiry of the circumstances surrounding the individual case. 473 U.S. at 57 (further noting that the "situs" of the injury "is not nearly as important as whether the suit requires the civilian court to

second-guess military decisions, and . . . impair essential military discipline."). Yet, just two years later, this Court described *Feres* as a categorical rule that "has been applied consistently to bar all suits on behalf of service members against the Government based upon service-related injuries." *Johnson*, 481 U.S. at 687-88. As a result, some circuits have grudgingly applied *Feres* mechanistically to foreclose all lawsuits by service personnel, as did the Seventh Circuit below, while others have employed balancing tests that examine whether the rationales behind the doctrine articulated by this Court are implicated.

The Seventh Circuit's treatment of *Feres* contrasts with the individualized determinations made in other circuits and applicable in other areas of legal dispute involving the same personnel. Accurately describing the law still applied in other circuits, Justice Kennedy, as a judge on the Ninth Circuit, recognized the balancing inherent in any case where rights are invoked by members of our armed forces: "[w]hile it is clear that one does not surrender his or her constitutional rights upon entering the military, the Supreme Court has repeatedly held that constitutional rights must be viewed in light of the special circumstances and needs of the armed forces." *Beller v. Middendorf*, 632 F.2d 788, 810 (9th Cir. 1980).

A review of the case law inexorably leads to the conclusion that, while "[c]ivilian courts must at very least hesitate long before entertaining suit which asks the court to tamper with established relationship between enlisted military personnel and their superior officers," *Chappell*, 462 U.S. at 300, "[n]ot every claim arising from a military decision

presents a nonjusticiable controversy." *Adkins v. United States*, 68 F.3d 1317, 1323 (Fed. Cir. 1995).

Thus, for example, this Court has recognized that considerations of the military's special status does not require deference when the issue involves certain types of gender discrimination, *see, e.g., Frontiero*, 411 U.S. 677 (military may not discriminate on eligibility for benefits), even if other allegations of gender discrimination are outside judicial cognizance when they involve the combat arena. *See, e.g., Rostker v. Goldberg*, 453 U.S. 57 (1981) (Congress may require a male-only military draft). *But see Bledsoe v. Webb*, 839 F.2d 1357 (9th Cir. 1988) (finding claim brought by a female civilian employee of a military department and premised on denial of embarkation privileges exclusively because of gender is justiciable).

Outside of medical-malpractice claims, courts often look at the facts and circumstances of military personnel claims and the deference owed the military. Thus, for example, the Third Circuit rejected an analysis to claims of military personnel that erroneously mixed "the concept of justiciability with the standards to be applied on the merits." *Dillard v. Brown*, 652 F.2d 316, 323 (3d Cir. 1981). That court further declared, "[i]f the military justification outweighs the infringement of the plaintiff's individual freedom, we may hold for the military on the merits, but we will not find the claim to be non-justiciable." *Id.* at 323-24. *Feres* usually operates differently from those rules, without rational justification.

After all, this Court has acknowledged that it has never held "that military personnel are barred from

all redress in civil courts for constitutional wrongs suffered in the course of military service." *Chappell*, 462 U.S. at 304-05. While Zmysly's underlying claim for medical malpractice does not seek redress for a constitutional wrong, his challenge to the constitutionality and application of *Feres* to his case does, yet can only be heard by this Court, which alone may reconsider *Feres*.

It is only in the category of cases covered by *Feres* that the courts have ever employed a categorical rule against justiciability that dismisses an action without even an opportunity to raise what the United States conceded are "serious issues." App. 18a. The *Feres* category of cases, however, are not *sui generis* and do not support such a distinction from other disputes between the military and its personnel.

In the Ninth, Tenth, and Eleventh Circuits, a four-part test informs the applicable analysis, weighing: (1) the nature and strength of the plaintiff's claim; (2) the potential injury to the plaintiff if review were denied; (3) the type and extent of potential interference with the military function that judicial review would involve; and (4) the extent to which military expertise or discretion is involved. *See, e.g., Wenger v. Monroe*, 282 F.3d 1068, 1072 (9th Cir. 2002); *Pringle v. United States*, 208 F.3d 1220, 1224 (10th Cir. 2000); *Rucker v. Secretary of the Army*, 702 F.2d 966, 969 (11th Cir. 1983); *but see Pierce v. United States*, 813 F.2d 349, 352-54 (11th Cir. 1987) (employing a three-part test). The Fifth Circuit utilizes a similar three-part test. *See Parker v. United States*, 611 F.2d 1007, 1013-15 (5th Cir. 1980). The Second Circuit, rejecting those approaches, adopted a standard that is analogous to

the "scope of employment" standard in workers compensation cases. *Taber*, 67 F.3d at 1049-50.

No persuasive reason exists to take a different approach to cases within the *Feres* category, raising serious and profound issues about the unequal treatment of these claims.

C. Confusion About *Feres* Has Engendered Inconsistent Results in the Circuits, Including Results that Can Only be Characterized as Absurd

The shifting and inconsistent rationales advanced to support the *Feres* doctrine have understandably engendered confusion among the circuits. *See Taber*, 67 F.3d at 1038 (*Feres* "has become an extremely confused and confusing area of law."). In many instances, as here, the justifications advanced are either inapplicable or too attenuated to support the classification. *Cf. City of Cleburne*, 473 U.S. at 446; *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528, 536-38 (1973). In a large number of cases, some circuits have avoided categorical application of *Feres* non-justiciability by focusing on the inapplicability of the rationales adopted by this Court as a doctrinal matter. *See e.g., Regan v. Starcraft Marine, LLC*, 524 F.3d 627 (5th Cir. 2008) (using three-part test to find service member injured in boating accident at military facility was not *Feres*-barred); *Schoenfeld v. Quamme*, 492 F.3d 1016 (9th Cir. 2007) (lawsuit not barred for serviceman who lost his leg when vehicle crashed into previously damaged, but unrepaired, guardrail on military base); *Dreier v. United States*, 106 F.3d 844 (9th Cir. 1996) (wrongful-death action not barred where soldier fell into on-base wastewater drainage channel after off-duty afternoon of beer

drinking); *Taber, supra* (no bar to lawsuit by off-duty serviceman for injuries sustained in automobile accident with another off-duty serviceman, who had been drinking on base); *Cortez v. United States*, 854 F.2d 723 (5th Cir. 1988) (widow of army specialist who was hospitalized for mental disorders and who jumped from an eighth-floor window to his death not barred because hospitalization was not incident to service); *Johnson v. United States*, 704 F.2d 1431 (9th Cir. 1983) (officer could maintain action for automobile accident injuries following after-hours party at NCO club); *Mills v. Tucker*, 499 F.2d 866 (9th Cir. 1974) (survivors of naval officer could bring action for fatal traffic accident on naval roadway as decedent was returning from civilian moonlighting job to his navy-owned quarters); *Hand v. United States*, 260 F. Supp 38 (M.D. Ga. 1966) (serviceman on 24-hour pass struck by Army jeep negligently operated by a soldier acting within the scope of his duties could maintain FTCA action because injuries were not incident to service).

A consequence of the increased number of women service members has been to magnify the *Feres* rule's arbitrariness, particularly in the area of medical negligence. *Compare, e.g., Scales v. United States*, 685 F.2d 970 (5th Cir. 1982) (barring cause of action for harm to child due to negligent prenatal care in providing rubella vaccine to mother while pregnant and on active duty), *with Brown v. United States*, 462 F.3d 609 (6th Cir. 2006) (rejecting *Scales* and finding no *Feres* bar to action by parent of child born with spina bifida caused by military doctor's prescription of prenatal vitamins to child's mother while on active duty with the Navy), and *Romero v. United States*, 954 F.2d 223, 226-27 (4th Cir. 1992) (*Feres* did not bar recovery for injuries to the child of active duty

Navy parents born with cerebral palsy due to inadequate prenatal care by military doctors.).

Even within the medical malpractice area, disparate results obtain. *Compare Maas v. United States*, 94 F.3d 291, 296 (7th Cir. 1996) (finding no *Feres* bar to claimed failure to warn discharged serviceman of increased risk of cancer due to exposure to nuclear weapons fragments while on active duty), and *M.M.H. v. United States*, 966 F.2d 285, 288-89 (7th Cir. 1992) (no *Feres* bar to claim that Army had negligently failed to notify soldier post-discharge that it had previously erred in telling her she was HIV-positive); with *Maddick v. United States*, 978 F.2d 614, 616 (10th Cir. 1992) (*Feres* barred claim by former Navy diver that government doctors should have warned him post-discharge that his diving activities put him at risk of degenerative bone disease.).[8]

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[8] Adding to the arbitrariness of the rule are decisions that claims by ROTC cadets are *Feres*-barred despite the fact that they not on active duty. *E.g., Lovely v. United States*, 570 F.3d 778 (6th Cir. 2009); *Brown v. United States*, 151 F.3d 800, 805 (8th Cir. 1998) (medical negligence claim). At the same time, there is a split among the circuits as to whether injury to service members on the Temporary Disability Retirement List, who are removed from active duty, are nonetheless *Feres*-barred. *Bradley v. United States*, 161 F.3d 777, 782 (4th Cir. 1998); *See generally* Hilde Conte-Pearlstein, *TDRL and the Feres Doctrine*, 43 A.F. L. REV. 259 (1997). *Cf. Sloan v. United States*, No. 99-2991, 2000 WL 307264 (8th Cir. Mar. 27, 2000) (unreported) (claim of widow of Air Force sergeant who died of complications following surgery was barred by *Feres* because the patient's placement on the TDRL was not effective until the following day).

Feres's arbitrary distinctions can also lead to absurd results. In *Del Rio v. United States*, 833 F.2d 282 (11th Cir. 1987), an active-duty sailor alleged that negligent prenatal care at a naval medical center resulted in injury to herself and to her twin boys. One, Frederick, was left with permanent injuries, and the other, Michael, died within a few days. The Eleventh Circuit ruled that under *Feres*, Del Rio could not recover for her own injuries, she could recover in a suit on behalf of Frederick, but not Michael, all based on the same negligent actions by the same medical personnel. *Id.* at 286-88.

This Court's guidance is needed to settle whether *Feres* constitutes a categorical bar or one that requires a balancing of interests, as the circuits have diverged.

D. The Confusing, Shifting and Difficult Rationales for the *Feres* Doctrine Provide No Rational Basis for Adverse Treatment of Military Members and Support Reexamination by this Court, Particularly in Cases Alleging Non-combat Medical Negligence

The *Feres* rule has no compelling rationale and certainly no rationale that supports a distinction between tort actions and other legal disputes between the military and its personnel. The bases advanced to justify the rule have been multiple, confused, and shifting. Consequently, any relationship between the adverse treatment of military members and each "asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Clebourne*, 473 U.S. at 446.

The first rationale set out in *Feres*, which included claims of medical malpractice, was that "plaintiffs can point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the United States." 340 U.S. at 141, quoting 28 U.S.C. § 2674. This Court soon distanced itself from that view in *Brown*, 348 U.S. 110, where it specifically held allegations of medical malpractice by government medical personnel did not "visit the Government with novel and unprecedented liabilities," but rather were claims "which might be cognizable under local law, if the defendant were a private party." *Id.* at 112-13. The Court abandoned the unique-liability rationale for *Feres* altogether in *Indian Towing v. United States*, 350 U.S. 61, 64-69 (1955).

Secondly, the *Feres* Court asserted that "[t]he relationship between the Government and members of its armed forces is distinctively federal in character" and that the government's liability should not be governed by the peculiarities of the local law of a place the plaintiff had not chosen. 340 U.S. at 143. The Court rejected precisely that reasoning in *United States v. Muniz*, 374 U.S. 150 (1963), and held that federal prisoners could sue under the FTCA, though their claims would be governed by the tort law of the state where they were involuntarily located. *Id.* at 161-62. The Court appeared to resurrect this uniformity rationale in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977), extending its reasoning to protect a government contractor from suit under state laws. *Id.* at 672. However, in *United States v. Shearer*, 473 U.S. 52 (1985), the Court stated that this rationale was "no longer controlling," *id.* at 58 n. 4, yet invoked it once again in *Johnson* where this Court noted that

"federal relationship is implicated to the greatest degree when a service member is performing activities incident to his federal service," such as a "military function" that "entails a [s]ignificant risk of accidents and injuries." 481 U.S. at 689, (internal quotation and citation omitted). If, as *Johnson*, suggests, the federal-relationship rationale has a lesser gravitational pull in cases where the soldier was not performing a military function, then the Seventh Circuit's categorical rule is entirely inappropriate in a medical malpractice case like the instant action.

The third *Feres* rationale drew a parallel to the exclusivity of workers compensation benefits where government provides "simple, certain, and uniform compensation for injuries or death of those in armed services," and assumed that Congress did not intend to permit service members to seek additional compensation through damage suits. 340 U.S. at 144.

The Court rejected that reasoning four years later:

> We noted in the *Brooks* case that the usual workmen's compensation statute was in this respect different from those governing veterans, that Congress had given no indication that it made the right to compensation the veteran's exclusive remedy, that the receipt of disability payments under the Veterans Act was not an election of remedies and did not preclude recovery under the Tort Claims Act but only reduced the amount of any judgment under the latter Act. We adhere to that result."

Brown, 348 U.S. at 113 (citation omitted).

Courts have not only allowed FTCA recovery to recipients of benefit programs, but have consistently applied the *Feres* bar against claimants who were *not* eligible for government benefits.[9] *Sidley v. United States Dep't of Navy*, 861 F.2d 988 (6th Cir. 1988), held that a serviceman's claim that Navy doctors negligently treated his fractured leg following a motorcycle accident that occurred while the serviceman was off base and off-duty was barred by *Feres*, despite the fact that he was not eligible for compensation under the Veterans' Benefit Act. The court stated that while VBA compensation "makes the sometimes harsh effect of the *Feres* doctrine more palatable, the denial or unavailability of these benefits does not affect the applicability of the *Feres* doctrine." *Id.* at 991. *See also Bowers v. United States*, 904 F.2d 450, 452 (8th Cir. 1990) (*Feres* barred claim for medical malpractice during a pre-induction physical, even though plaintiff was not a service member at the time of the alleged negligence and was not eligible for veterans' benefits).

The *Shearer* Court explicitly held that this "additional-compensation" rationale, too, was also "no longer controlling." 473 U.S. at 58 n.4.

A fourth justification was not set out in *Feres*, but explained by this Court four years later as based on

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[9] In the Complaint, Zmysly alleged that, although he had received some medical benefits, he had not received all the necessary and adequate medical care and treatment he has needed through the United States, its military, or its health network and that the Zmyslys are unable to pay for the care and treatment he needs.

"peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty." *Brown*, 348 U.S. at 112. The Court thereafter indicated that the military-discipline explanation rationale was the "best" rationale for the *Feres* immunity. *Shearer*, 473 U.S. at 57; *Chappell*, 462 U.S. at 299. *See also Overton v. N.Y. State Div. of Military & Naval Affairs*, 373 F.3d 83, 89-90 (2d Cir. 2004) ("the *Feres* doctrine is designed in large measure to prevent civilian courts from interfering with military discipline and decision-making.").

It is difficult to see how barring Zmysly and other victims of stateside, non-combat-related medical negligence from seeking compensation from the government for care and treatment made necessary by the negligence of government medical personnel furthers this interest. Not only were his treating health care providers not superior officers (and, in at least one case, a civilian), but they were not engaged in anything that might remotely be characterized as a military operation or anything incident to a military operation. In short, liability would not require a court to intrude on sensitive military affairs, second-guess military decision-making, or somehow impair military effectiveness. For that reason, the Seventh Circuit has recognized that there is but a "tenuous link between these [discipline and decision-making] rationales and malpractice cases," even as it felt constrained to dismiss medical malpractice actions pursuant to *Feres* and its categorical approach. *Selbe*, 130 F.3d at 1268.

III. THE *FERES* RULE DEPRIVES MEMBERS OF THE MILITARY SERVICES OF THE FUNDAMENTAL RIGHT TO SEEK LEGAL REDRESS FOR INJURY GUARANTEED TO ALL OTHER AMERICANS AND MERITS APPLICATIONS OF STRICT SCRUTINY

The Seventh Circuit's categorical approach to *Feres* implicates two separate aspects of the fundamental right of access to the courts. First, it permits a defendant like Dr. Kaplan here, to hide his employment status, move for dismissal on non-*Feres* grounds, and benefit from the government's *Feres* motion. To this day, Dr. Kaplan has given no indication whether he was a government employee, a contractor, or a consultant at the hospital.

Zmysly's only indications of Dr. Kaplan's status was in footnote in the government's motion for a 45-day extension of time, filed December 23, 2008, indicating that Kaplan was employed by a contractor for the United States (U.S. Dist. Ct. Doc. 16; U.S. Mot. for Ext. of Time 2 n.1.), and a footnote in the government's motion for summary affirmance in the Seventh Circuit, this time calling Kaplan a "contractor with the United States," not within the FTCA's definition of a federal employee, and who is "represented by private counsel." (App. 19a n.3.). In his own appellate motion for summary affirmance, Kaplan sought affirmance on *Feres* grounds, as if he were a civilian employee of the government.

By treating *Feres* immunity as a subject-matter jurisdiction issue as to all defendants, the courts below foreclosed any discovery that would permit Zmysly to determine the employment relationship, if

any, between the United States and Dr. Kaplan. Petitioner was thus denied any opportunity to argue that *Feres* immunity did not apply to Dr. Kaplan. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 510 (1988) (rejecting *Feres* as a defense for government contractors because it would be "in some respects too broad and in some respects too narrow."); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1346-49 (11th Cir. 2007) (rejecting application of *Feres* to government contractors not involved in sensitive military judgments); *Chapman v. Westinghouse Elec. Corp.*, 911 F.2d 267, 272 (9th Cir. 1990). In essence, Dr. Kaplan's strategy of laying low as the United States sought immediate dismissal cut off Zmysly's opportunity to pursue an action that might not otherwise have been barred by *Feres*, merely because the District Court dismissed all defendants on *Feres* grounds and Petitioner had no opportunity to discover Dr. Kaplan's real status. This anomaly in applying a categorical approach warrants this Court's attention.

Second, *Feres* also operates in the Seventh Circuit to dismiss causes of action against the government that a balancing of interests test, as used in other circuits, may not bar. After all, *Feres* is not a rule that simply allocates economic benefits or regulatory burdens. It closes the courthouse doors to a class of persons seeking redress for wrongful injury. The right to seek such legal recourse is a foundational principle deeply rooted in the common law. This Court has described the right of access to the courts as "one of the highest and most essential privileges of citizenship." *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). Moreover, "it is the right conservative of all other rights, and lies at the foundation of orderly government." *Id.*

The American constitutional version of the right reflects Sir Edward Coke's influential study, which concluded that Magna Carta expressly guaranteed that "every subject of this realme, for injury done to him ... by any other subject ... without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay." 1 Edward Coke, *The Second Part of the Institutes of the Laws of England* *55 (London, E. & R. Brooke 1797). *See also* Edward Corwin, *The "Higher Law" Background of American Constitutional Law,* 42 Harv. L. Rev. 365, 393 (1929).

Sir William Blackstone's subsequent influential treatise on the English common law established that the right of access to courts was "the right of every Englishman" to "apply[ ] to the courts of justice for redress of injuries." 1 William Blackstone, *Commentaries on the Laws of England* * 141 (8th ed. 1778).

While existence of the right of access to the courts did not compel the government to waive sovereign immunity, Congress did so in enacting the FTCA in 1946. Having done so without textual exception for the non-combat-related medical malpractice injuries, the question of first impression presented here is whether these members of the armed forces may be non-suited for their claims when members of their families, non-active duty personnel, and veterans can make identical claims in court. Having undertaken to waive sovereign immunity, the government may not arbitrarily—or, because a fundamental right is implicated, may not without compelling reasons—deny that remedy to a similarly situated class of people. *Cf. Goldberg v. Kelly,* 397 U.S. 254 (1970).

Once Congress has opened the doors of the district court to claims for money damages for harms caused by government employees, including negligent medical care, exclusion of Zmysly and other active-duty members of the armed forces from that remedy can stand only if necessary to further a compelling governmental interest.

At a time when Americans' attention is focused on the efforts of our armed forces to protect them, it is a cruel irony that the law denies them the recourse for wrongful injury that is available to others similarly situated in every respect except status as active-duty military. It is a discrimination that touches upon the fundamental right of access to the courts, warranting not only this Court's attention, but its strict scrutiny. This Court should grant the Petition to require the government to make a showing of compelling justification.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

March 15, 2010 Respectfully submitted,

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APPENDIX

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APPENDIX A:

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
JUDGMENT IN A CIVIL CASE
(AUG. 20, 2009)

JUDGMENT IN A CIVIL CASE
Case Number: 08-C-6111

Zmysly

v.

United States of America, *et al.*

AO 450 (Rev. 5/85) Judgment in a Civil Case

Case 1:08-cv-06111 Document 55

Filed 08/20/2009

United States District Court
Northern District of Illinois
Eastern Division

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that for the reasons provided in this Minute Order, the Court grants defendants' motion to dismiss [doc. no. 38] because it lacks subject matter jurisdiction. All

other motions pending before this Court are dismissed as moot. This case is hereby terminated.

Michael W. Dobbins, Clerk of Court
/s/ Carole Gainer, Deputy Clerk

Date: 8/20/09

APPENDIX B:

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
MINUTE ORDER
(AUG. 20, 2009)

United States District Court, Northern District of Illinois

Case Number 08-c-6111

Date 8/20/09

Zmysly v. United States, *et al.*

Case 1 :08-cv-06111 Document 54 Filed 08/20/2009

For the reasons provided in this Minute Order, the Court grants defendants' motion to dismiss [doc. no. 38] because it lacks subject matter jurisdiction. All other motions pending before this Court are dismissed as moot. This case is hereby terminated.

STATEMENT

Yuriy Zmysly, through his representative and guardian, Aimee Zmysly, has sued the United States of America, Cherry Point Naval Hospital, David Kaplan, James Christopher and Chris Oudekerk, regarding medical care he received at Cherry Point Naval Hospital. Kaplan has moved to dismiss the complaint pursuant to Federal Rule of Procedure ("Rule") 12(b)(6) and the other defendants have moved to dismiss the complaint pursuant to Rule

12(b)(1). For the reasons provided in this Memorandum Opinion and Order, the Court grants defendants' motion to dismiss for lack of subject matter jurisdiction as to all defendants and dismisses all other pending motions as moot.

On January 9, 2006, Zmysly, an active-duty Marine, experienced severe abdominal pain, and after Dr. David Kaplan treated Zmysly in the emergency room, Zmysly was admitted into the Cherry Point Naval Hospital. On January 10, 2006, Dr. James Christopher diagnosed Zmysly with a perforated appendix. Chris Oudekerk, CRNA, intubated Zmysly and administered general anesthesia. Dr. Christopher then performed a laparoscopic appendectomy. Shortly after the appendectomy, complications arose, and Dr. Christopher performed an emergency cricothyroidotomy on Zmysly in order to establish an airway so that Zmysly could breathe. Zmysly was later transferred to Craven Regional Medical Center where medical personnel diagnosed him with an anoxic brain injury secondary to laryngeal edema and possible aspiration. Zmysly has been receiving medical benefits provided by the Veterans' Benefits Act since the time of his appendectomy.

On January 8, 2008, Zmysly filed a medical negligence claim under the Federal Torts Claim Act, 28 U.S.C. §§ 2671-80 ("FTCA") with the United States government. On March 25, 2008, the government denied Zmysly's claim. On October 24, 2008, Zmysly filed the instant action alleging medical negligence on the part of the United States through its agents or employees pursuant to the FTCA. In Count I, Zmysly alleges that he sustained personal and pecuniary injuries directly and

proximately caused by the negligent medical treatment provided by the defendants. In Count II, Zmysly asserts that the current application of the FTCA unjustifiably restricts his constitutional rights as guaranteed by the First, Fifth, Seventh, Ninth and Fourteenth Amendments.

When considering a motion to dismiss for lack of subject matter jurisdiction, the Court must accept all well-pleaded allegations as true and draw all reasonable inferences in favor of the plaintiff. *Scott Air Force Base Props., LLC* v. *County of St. Clair, Ill.*, 548 F .3d 516, 519 (7th Cir. 2008). The court may also "look beyond the jurisdictional allegations of the complaint" to any evidence submitted on the issue for the purpose of determining whether subject matter jurisdiction exists. *Alicea-Hernandez* v. *Catholic Bishop of Chi.*, 320 F.3d 698, 701 (7th Cir. 2003).

The FTCA provides that the "United States shall be liable . . . to tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Thus, the FTCA "serves as a broad waiver of federal sovereign immunity." *Stephenson* v. *Stone*, 21 F.3d 159, 162 (7th Cir. 1994). District courts have subject matter jurisdiction over FTCA claims pursuant to 28 U.S.C. § 1346(b).

Defendants argue that the Court's jurisdiction over this claim is barred by application of the *Feres* doctrine. In *Feres*, the Supreme Court held that "the Government is not liable under the Federal Torts Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to military service." *Feres v. United States*, 340 U.S. 135, 146 (1950) (emphasis in original). The

Feres doctrine has been consistently reaffirmed by both the Supreme Court and the Seventh Circuit over the last half century. *See, e.g., United States v. Johnson*, 481 U.S. 681, 686 (1987); *United States v. Shearer*, 473 U.S. 52, 57 (1985); *Smith v. United States*, 196 F.3d 774, 776 (7th Cir. 1999); *Jones v. United States*, *112* F.3d 299, 301 (7th Cir. 1997). "The dispositive inquiry remains whether the service-member stand[s] in the type of relationship to the military at the time of his or her injury that the occurrences causing the injury arose out of activity incident to military service." *Stephenson*, 21 F.3d at 162.

Zmysly argues that his appendicitis was not a consequence of military service. However, "courts have routinely applied *Feres* to bar medical malpractice claims that arose from treatment by military doctors of active-duty personnel. . . . This is true even where the underlying injury that brought the service member to the hospital was not caused by service." *Jones*, 112 F.3d at 302 (applying *Feres* to bar claim brought by an active-duty member of the Army for injuries resulting from surgery at a naval hospital to relieve chronic abdominal pain unrelated to military service); *see Selbe v. United States*, 130 F.3d 1265, 1268 (7th Cir. 1997) (applying *Feres* to bar claim brought by an active-duty member of the National Guard for negligent medical care of a broken hand unrelated to military service); *Borden v. Veterans Admin.*, 41 F .3d 763, 764 (1st Cir. 1994) (applying *Feres* to bar claim brought by an active-duty member of the Army against a military hospital for negligent treatment of a knee injury received while playing recreational basketball); *Collins v. United States*, 642 F.2d 217, 222 (7th Cir. 1981) (applying *Feres* to bar claim brought by an active-

duty U.S. Air Force Academy Cadet receiving negligent medical treatment from Air Force personnel for blurred vision unrelated to military service). "Once it is determined that a service member . . . was on active-duty during the time military medical treatment was rendered, the treatment is necessarily incident to service and judicial inquiry ends." *Jones*, 112 F.3d at 302 (quoting *Madsen* v. *United States*, 841 F.2d 1011, 1014 (10th Cir. 1987)).

Zmysly underwent an appendectomy procedure at Cherry Point Naval Hospital while he was an active-duty private in the U.S. Marines. Because he was on active-duty, his injury occurred in the course of activity incident to military service, and thus, the *Feres* doctrine bars his medical malpractice claim under the FTCA. Therefore, the instant action must be dismissed with prejudice as to all defendants for lack of subject matter jurisdiction.

Zmysly argues that the Supreme Court has not yet held that the *Feres* doctrine applies to medical malpractice claims made under the FTCA. However, two ofthe three cases decided in *Feres*, *i.e.*, *Jefferson v. United States* and *United States v. Griggs*, were based on medical malpractice allegations. 340 U.S. at 137. Thus, contrary to plaintiff's assertion, the Supreme Court has unequivocally held that the *Feres* doctrine bars medical malpractice claims brought under the FTCA by active-duty members of the armed services. *Id.* at 146.

Zmysly further asserts that the factual and legal bases for the *Feres* doctrine have changed significantly since *Feres* was decided. Such an

assertion, even if true, would not undermine the *Feres* doctrine's application to the instant action. In *Johnson*, the Supreme Court reaffirmed *Feres* based on three rationales: (1) the need to protect the distinctively federal relationship between the government and the armed forces, which could be adversely affected by applying differing tort laws; (2) the existence of statutory compensatory schemes; and (3) the need to avoid interference with military discipline. 481 U.S. at 688-91. *Post-Johnson*, these rationales continue to be recognized as adequate bases to support the application ofthe doctrine. *See Smith v. United States*, 196 F.3d 774, 776-77 (7th Cir. 1999); *Jones*, 112 F.3d at 301.

Zmysly believes that the Court has the authority to hold that the *Feres* doctrine is inapplicable to medical malpractice claims under the FTCA. He is mistaken. The foundational principle of *stare decisis* is based on a "hierarchical system" in which the decisions of a higher court are binding on lower courts. *Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir. 2004). Unless the last decision by a higher court or statutory changes make it almost certain that the higher court would abrogate a given doctrine, the lower court is required to uphold and adhere to such a doctrine. *Olson v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731, 734 (7th Cir. 1986). The *Feres* doctrine has been applied to medical malpractice cases brought by active-duty members of the military by the Supreme Court and Seventh Circuit for nearly sixty years. In addition, Congress has never modified the *Feres* doctrine since its inception in 1950. Although the Seventh Circuit has noted that there has been criticism of the doctrine and has even made reference to the "tenuous link" between the doctrine's rationales and

malpractice cases, the Supreme Court's decision in *Feres* has consistently been upheld. *See Selbe*, 130 F.3d at 1265-68; *Stephenson*, 21 F.3d at 162 (the *Feres* doctrine has become "black letter law"). Accordingly, the Court has no authority to hold that the *Feres* doctrine is inapplicable to the medical malpractice claim in the instant case.

In Count II, Zmysly argues that applying *Feres* to bar his medical malpractice action violates his constitutional rights provided by the First, Fifth, Seventh, Ninth and Fourteenth Amendments. In order for the Court to have jurisdiction over any suit against the federal government, there must be a clear statement from the government that waives sovereign immunity as well as a "claim falling within the terms of the waiver." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003). "The terms of consent to be sued may not be inferred, but must be 'unequivocally expressed.'" *Id.* (quoting *Mitchell v. United States*, 445 U.S. 535, 538 (1980)).

In noting that no law ever existed that would permit "a soldier to recover for negligence . . . against . . . the Government he is serving," the Supreme Court has concluded that the FTCA did not create a cause of action allowing for active-duty members of the armed services to bring claims against the Government for injuries arising out of or in the course of activity incident to military service. *Feres*, 340 U.S. at 141, 146; *see Labash v. u.s. Dep't of Army*, 668 F.2d 1153, 1156 (10th Cir. 1982) ("Congress has chosen to limit the extent of the United States' waiver of sovereign immunity by restricting a serviceman to the specific remedies specified in the Veterans' Benefit Act."); *Seveny v.*

U.S. Gov't, Dep't of Navy, 550 F. Supp. 653, 659 (D.R.I. 1982) (applying the *Feres* bar to an FTCA claim and noting that "an action sounding in constitutional, as opposed to common law, tort is not exempt from application of the *Feres* doctrine . . . . To find otherwise would permit abrogation of *Feres-based* immunity through a mere exercise of pleading" in circumstances where the Supreme Court has "securely barred the doors to the courthouse." (quotation omitted)). *Cf. United States v. Stanley*, 483 U.S. 669, 684 (1987) (extending *Feres* by holding that no Bivens remedy is available for injuries that "arise out of in the course of activity incident to military service"). "The entire statutory mosaic under which our nation's military personnel are marshalled, deployed and maintained requires . . . that continued allegiance be given *Feres* with respect to service-related injuries." *Briggs v. United States*, 617 F. Supp. 1399, 1405 (D.R.I. 1985) (quotation omitted). Thus, there is no affront to legitimate constitutional rights by such adherence. *Id.*

Given *Feres* and its progeny, the government has not unequivocally expressed consent to be sued by active-duty members of the military, such as Zmysly. Therefore, Zmysly's cause of action against the government seeking a declaration that the *Feres* doctrine violates his constitutional rights fails as a matter of law. Accordingly, the Court dismisses the complaint without prejudice as to all defendants due to lack of subject matter jurisdiction.

Lastly, Zmysly opines that the *Feres* doctrine itself violates the separation of powers. For the same reasons discussed above, the Court lacks subject matter jurisdiction regarding this claim against the

government.

Further, the Court notes that the *Feres* Court did not create judicial legislation. Instead, the *Feres* Court examined the FTCA in order to construe it according to Congress' intent. "This Act, however, should be construed to fit . . . into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." *Feres*, 340 U.S. at 139. In its analysis, the *Feres* Court noted that Congress' primary purpose of the FTCA was to provide tort remedies against the government for those previously without. *Id.* However, Congress had previously provided active-duty members of the armed services a comprehensive system of relief by statute. *Id.* Hence, the *Feres* Court inferred that Congress did not intend or even contemplate that the FTCA would provide a means of recovery for injuries occurring "incident to military service." *Id.* at 144. Based on its analysis of Congress' intent, the *Feres* Court concluded: "We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command." *Id.* at 144; *see Stephenson*, 21 F.3d at 162; *Collins*, 642 F.2d at 219. As noted nearly forty years later in *Johnson*, Congress possesses a remedy to "alter misinterpretation of intent" but has not modified the *Feres* doctrine since its inception in 1950. *Johnson*, 481 U.S. at 686. In light of the *Feres* Court's analysis and the fact that Congress has not altered the Court's conclusion in nearly sixty years, the *Feres* doctrine does not violate constitutionally mandated separation of

powers. The Court grants defendants' motion to dismiss this action in its entirety.

For the foregoing reasons, the Court grants defendants' motion to dismiss [doc. no. 38] because it lacks subject matter jurisdiction. All other motions pending before this Court are dismissed as moot.

APPENDIX C:

DEFENDANTS-APPELLEES UNITED STATES, CHERRY POINT NAVAL HOSPITAL, JAMES CHRISTOPHER, AND CHRIS OUDEKERK MTOION FOR SUMMARY AFFIRMANCE OR, IN THE ALTERNATIVE, TO RESET BRIEFING SCHEDULE FILED IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (NOV. 18, 2009)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

U.S.C.A. -7th Circuit RECEIVED
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GINO J. AGNELLO

No. 09-3402

Appeal from the United States District Court for the Northern
District of Illinois, No. 08 C 6111
Ronald A. Guzman, District Judge

AIMEE ZMYSL Y, as representative
and guardian of YURIY ZMYSLY,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
CHERRY POINT NAVAL HOSPITAL,
DAVID KAPLAN, JAMES CHRISTOPHER,
AND CHRIS OUDEKERK,

Defendants-Appellees.

MOTION BY DEFENDANTS-APPELLEES UNITED STATES, CHERRY POINT NAVAL HOSPITAL, JAMES CHRISTOPHER, AND CHRIS OUDEKERK FOR SUMMARY AFFIRMANCE OR, IN THE ALTERNATIVE, TO RESET BRIEFING SCHEDULE

Defendants-Appellees United States, Cherry Point Naval Hospital, James Christopher, and Chris Oudekerk (the fede0al defendants), by Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, in the interest of judicial economy, move for summary affirmance of the district court's decision dismissing this Federal Tort Claims Act action against them based on the *Feres* doctrine, and in support thereof state as follows:

1. Plaintiff-appellant Aimee Zmysly, as representative and guardian of Yuriy Zmysly, brings this medical malpractice action against the federal defendants under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680. The complaint alleges that Yuriy Zmysly was an active-duty private in the U.S. Marine Corps at all relevant times, that he underwent an appendectomy at a military hospital (the Cherry Point Naval Hospital in Cherry Hills, North Carolina), that alleged negligence during the appendectomy caused him to suffer an hypoxic brain injury, and that he is now severely disabled. R. 1, Complaint ¶¶ 3, 4, 13, 14, 22, 32-35, 48, 57-58 and Ex. B.[1]

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[1] "R." references are to numbered items in the record on appeal. "App." references are to Zmysly's appendix.

2. On March 5, 2009, the federal defendants moved for dismissal from Zmysly's FTCA claim based on the *Feres* doctrine established by the Supreme Court in *Feres v. United States*, 340 U.S. 135 (1950). R. 38, 39. In *Feres*, the Supreme Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id.* at 146. Since *Feres*, the Supreme Court, this court, and many other circuits have repeatedly found that the *Feres* doctrine bars medical malpractice claims under the FTCA arising out of treatment by military doctors of active-duty personnel. *Griggs v. United States*, 178 F.2d 1, 2 (10th Cir. 1949), *rev'd sub nom., Feres v. United States*, 340 U.S. 135 (1950); *Jefferson v. United States*, 77 F. Supp. 706, 708 (D. Md. 1948), *aff'd*, 178 F.2d 518 (4th Cir. 1949), *aff'd sub nom., Feres v. United States*, 340 U.S. 135 (1950); *Selbe v. United States*, 130 F.3d 1265, 1268 (7th Cir. 1997); *Jones v. United States*, 112 F.3d 299, 302 (7th Cir. 1997); *Collins v. United States*, 642 F.2d 217 (7th Cir. 1981); *Cutshall v. United States*, 75 F.3d 426 (8th Cir. 1996); *Hayes v. United. States*, 44 F.3d 377 (5th Cir.), *cert. denied*, 516 U.S. 814 (1995); *Borden v. Veterans Administration*, 41 F.3d 763 (1st Cir. 1994); *Appelhans v. United States*, 877 F.2d 309 (4th Cir. 1989); *Madsen v. United States*, 841 F.2d 1011 (10th Cir. 1987); *Atkinson v. United States*, 825 F.2d 202 (9th Cir. 1987); *Rayner v. United States*, 760 F.2d 1217 (11th Cir. 1985) (per curiam).[2]

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[2] The federal defendants' motion to dismiss also sought other relief unrelated to *Feres* and its progeny. R. 38, 39. That reliefis not discussed here because both the

3. After full briefing (R. 38, 39, 50, 53), on August 20, 2009, the district court issued a judgment and minute order dismissing this action pursuant to the *Feres* doctrine. App. 21-25. In its decision, the district court observed that the *Feres* doctrine has been consistently reaffirmed by both the Supreme Court and the Seventh Circuit, and that the *Feres* doctrine applies even when the underlying injury that brought the service member to the hospital was not caused by service. App.23. The district court further observed that the *Feres* doctrine has been repeatedly applied to medical malpractice cases brought by active-duty members of the military by both the Supreme Court and the Seventh Circuit for nearly sixty years. App. 24. In addition, Congress has never modified the *Feres* doctrine since its inception in 1950. *Id.* Accordingly, the district court correctly concluded that the *Feres* doctrine was binding "black letter law" that plainly barred Zmysly's FTCA claim. *Id.*

4. The district court also found that application of the *Feres* doctrine to Zmysly's medical malpractice claim was not an affront to any constitutional principles. App.24-25. In reaching this conclusion, the district court explained that the United States has not waived its sovereign immunity to constitutional claims by active-duty members of the military. *Id.* The district court also noted that the Supreme Court's decision in *United States v. Stanley*, 483 U.S. 669, 684 (1987), extended the *Feres* doctrine to bar individual-liability *Bivens* claims against federal employees for constitutional injuries that

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district court's decision and Zmysly's appeal focus exclusively on the *Feres* doctrine.

arise out of or in the course of activity incident to military service. App. 25. Lastly, the district court explained why the *Feres* doctrine did not violate constitutional separation of powers principles. *Id.* Accordingly, the district court granted the federal defendants' motion to dismiss. *Id.*

5. Zmysly's appellate brief asks this court to declare the *Feres* doctrine inapplicable to her FTCA claim because the rationales for the *Feres* doctrine allegedly fail to justify its application to medical malpractice claims. Zmysly Br. at 5-10. This argument fails on *stare decisis* grounds because, as Zmysly herself concedes, this court has already held that the allegedly tenuous link between the *Feres* rationales and medical malpractice claims does *not* render *Feres* inapplicable. Zmysly Br. at 10; *Selbe*, 130 F.3d at 1268. Zmysly also asks this court to declare the *Feres* doctrine inapplicable to medical malpractice claims by military personnel because doing otherwise will allegedly raise serious constitutional issues. Zmysly Br. at 10-19. Once again, however, this argument fails on *stare decisis* grounds because this court has already held on at least three occasions—in *Selbe* and *Jones* and *Collins*—that *Feres* bars medical malpractice claims arising out of treatment of active-duty personnel by military doctors. More importantly, moreover, Zmysly's position cannot prevail because two of the Supreme Court's three original *Feres* decisions, *Griggs* and *Jefferson,* reached the same result and are, of course, binding precedent. As this court stated succinctly in *Selbe*, "that is the end of the matter" unless and until the Supreme Court overrules *Feres* on its own. *Selbe,* 130 F.3d at 1268.

6. As this court has said, "[o]urs is a hierarchical

system," and when a lower court believes a superior court botched a decision, it may report its conclusions, but it is required to apply existing law. *Luna v. United States*, 454 F.3d 631,636 (7th Cir. 2006). "In a hierarchical system, decisions of a superior court are authoritative on inferior courts.... [T]he court of appeals must follow decisions of the Supreme Court whether or not we agree with them." *Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir.2004); *see also A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684, 687 (7th Cir. 2002) ("The Justices have insisted that courts lower in the hierarchy apply their precedents unless overruled, even if they seem incompatible with more recent decisions."). It is not for us to explain plaintiff's strategy, but it is a safe assumption that she understands that this court is not free to disregard clear, long-established Supreme Court precedent -it must apply existing law, whether or not it agrees with it. What plaintiff needs from this court is her ticket punched so she can raise her serious issues before the Supreme Court, the only court that can overturn sixty years of its own clear precedent.

7. In *Mather v. Village of Mundelein*, this court concluded that "[m]otions papers, in conjunction with the record and the district court's opinion, may show the appropriate disposition with sufficient clarity that a call for briefs would be nothing but an invitation for the parties to waste their money and the court's time." 869 F.2d 356, 357 (7th Cir. 1989). Moreover, "[i]t is gratuitous cruelty to put counsel through the exercise ofwriting briefs ... when the outcome is foredoomed." *Id.* at 358. The district court's dismissal of the federal defendants based on the *Feres* doctrine warrants summary affirmance

under the procedure accepted in *Mather*. No productive purpose would be served by full briefing and argument on this issue. Indeed, summary affirmance will likely hasten the day on which Zmysly will be in a position to file a petition for a *writ of certiorari* with the only court that has the power to grant the relief she seeks.

WHEREFORE, the federal defendants requests that the court grant this motion and summarily affirm the district court's dismissal of them from this lawsuit. Should the court deny this motion, the federal defendants request an extension of 30 days thereafter to file their brief.[3]

Dated: November 18, 2009

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney
By:
SAMUEL S. MILLER
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
(312) 886-9083

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[3] This motion is not brought on behalf of individual defendant-appellee David Kaplan. He is represented by private counsel because he was employed by a contractor with the United States at the time of the incidents at issue, and therefore does not fall within the definition of a federal employee for purposes of the FTCA. 28 U.S.C. § 2671.

CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that he caused a copy of the foregoing motion for summary affirmance to be served *by firstclass* mail on the person(s) listed below, on November 18, 2009.

Robert S. Peck
Center for Constitutional Litigation, P.C.
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Robert A. Clifford
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Schuyler, Roche & Crisham, P.C.
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Chicago, IL 60601

/s/Samuel S. Miller
Assistant United States Attorney

APPENDIX D:

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ORDER GRANTING SUMMARY AFFIRMANCE (DEC. 7, 2009)

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Office of the Clerk
Room 2722-219 S. Dearborn Street
Chicago, Illinois 60604
Phone: (312) 435-5850
www.ca7.uscourts.gov

Case: 09-3402
Document: 13
Filed: 12/07/2009
Pages: 2

ORDER

December 7, 2009

Originating Case Information:
District Court No.: 1:08-cv-06111
Northern District of Illinois, Eastern Division
District Judge Ronald A. Guzman

BEFORE:

FRANK H. EASTERBROOK, Chief Judge
WILLIAM J. BAUER, Circuit Judge
RICHARD A. POSNER, Circuit Judge

No.: 09-3402

AIMEE ZMYSLY, as Representative and Guardian of the Person and ESTATE OF YURIY ZMYSLY, a disabled adult,

Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees

The following are before the court:

1) MOTION BY DEFENDANTS-APPELLEES UNITED STATES, CHERRY POINT NAVAL HOSPITAL, JAMES CHRISTOPHER, AND CHRIS OUDEKERK FOR SUMMARY AFFIRMANCE OR, IN THE ALTERNATIVE, TO RESET BRIEFING SCHEDULE, filed on November 18, 2009, by counsel for the government appellees and appellees Christopher and Oudekerk;

2) PLAINTIFF-APPELLANT'S OPPOSITION TO DEFENDANTS-APPELLEES' MOTION FOR SUMMARY AFFIRMANCE OR, IN THE ALTERNATIVE, TO RESET BRIEFING SCHEDULE, filed on December 1, 2009, by counsel for the appellant;

3) MOTION BY DEFENDANT-APPELLEE DAVID KAPLAN, M.D. FOR SUMMARY AFFIRMANCE OR, IN THE ALTERNATIVE, TO RESET THE BRIEFING SCHEDULE, filed on December 3, 2009, by counsel for appellee Kaplan;

4) REPLY IN SUPPORT OF MOTION BY DEFENDANTS-APPELLEES UNITED STATES, CHERRY POINT NAVAL HOSPITAL, JAMES CHRISTOPHER, AND CHRIS OUDEKERK FOR SUMMARY AFFIRMANCE OR, IN THE ALTERNATIVE, TO RESET BRIEFING SCHEDULE, filed on December 3, 2009, by counsel for the government appellees and appellees Christopher and Oudekerk.

The appellant's husband, an active duty member of the Marine Corps, was taken to a military hospital for an emergency appendectomy and came out with severe brain damage. The appellant launched a medical malpractice suit under the Federal Tort Claims Act against the U.S., the hospital, navy medical professionals, and a physician under contract with the military. The district court dismissed the case for lack of subject matter jurisdiction under *Feres v. U.S.*, 340 U.S. 135 (1950), which holds that there can be no FTCA recovery based on injuries to servicemen sustained during active duty, including injuries caused by negligent military medical treatment. *See also Selbe v. United States*, 130 F.3d 1265, 1266-68 (7th Cir. 1997). And as *Jones v. United States*, 112 F.3d 299, 301-02 (7th Cir. 1997), notes, it doesn't matter whether the initial need for medical care arose because, for example, an active duty service member was shot by enemy fire or instead was injured playing basketball or needed his appendix removed. The appellant's brief acknowledges that precedent is against her but argues that this court should revisit the issue based on policy considerations and a 6th Circuit case holding that FTCA recovery for injuries to a pregnant service member's fetus were not barred by *Feres* (because the fetus isn't in the military). *See*

Brown v. United States, 462 F.3d 609 (6th Cir. 2006). The *Feres* doctrine and its application to medical malpractice are well-established, and appellant's policy arguments and invocation of a clearly distinguishable out-of-circuit case cannot change that.

Accordingly, IT IS ORDERED that the appellees' motions are GRANTED and the judgment is summarily AFFIRMED.

APPENDIX E:

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ORDER DENYING MOTION TO RECONSIDER (DEC. 14, 2009)

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Office of the Clerk
Room 2722-219 S. Dearborn Street
Chicago, Illinois 60604
Phone: (312) 435-5850
www.ca7.uscourts.gov

Case: 09-3402
Document: 15
Filed: 12/14/2009
Pages: 2

ORDER

December 14, 2009

Originating Case Information:
District Court No.: 1:08-cv-06111
Northern District of Illinois, Eastern Division
District Judge Ronald A. Guzman

BEFORE

FRANK H. EASTERBROOK, Chief Judge
WILLIAM J. BAUER, Circuit Judge
RICHARD A. POSNER, Circuit Judge

No.: 09-3402

AIMEE ZMYSLY, as Representative and Guardian of the Person and ESTATE OF YURIY ZMYSLY, a disabled adult,

Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA, et al.,

Defendants – Appellees

Upon consideration of the PLAINTIFF-APPELLANT'S OPPOSITION TO DEFENDANT-APPELLEE KAPLAN'S MOTION FOR SUMMARY AFFIRMANCE OR, IN THE ALTERNATIVE, TO RESET BRIEFING SCHEDULE, which this court construes as a motion to reconsider its order dated December 7, 2009,filed on December 10, 2009, by counsel for the appellant,

IT IS ORDERED that the motion is DENIED. Appellant has forfeited any argument that Kaplan is legally distinct from the other four defendants.

APPENDIX F:

28 U.S.C. § 2674

United States Code
Title 28. Judiciary and Judicial Procedure
§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon